

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case Nos.: 11-O-10454-DFM (11-O-11816);
)	11-O-13784; 11-O-15875
MICHAEL IAN BERRY,)	(11-O-15877); 12-O-14622
)	(Cons.)
Member No. 141993,)	
)	DECISION, ORDER OF INVOLUNTARY
A Member of the State Bar.)	INACTIVE ENROLLMENT, AND
)	ORDER VACATING STIPULATION
_____)	

INTRODUCTION¹

This decision concerns Respondent Michael Ian Berry's two disciplinary matters. In the first disciplinary matter and its consolidated cases, Respondent and the Office of the Chief Trial Counsel of the State Bar of California (State Bar) stipulated to the disposition of 15 counts of professional misconduct in five client matters, and the State Bar Court approved the stipulation. In August 2012, the California Supreme Court returned the stipulation in first disciplinary matter for further consideration of the recommended discipline in light of the applicable attorney discipline standards. Thus, the sole issue in that matter is the level of discipline.

In the second disciplinary matter, Respondent is charged with violating his probation conditions. The court finds culpability in that matter as set forth below.

¹ Unless otherwise indicated, all references to "rule" or "rules" refer to the State Bar Rules of Professional Conduct. Furthermore, all references to "section" or "sections" are to the Business and Professions Code.

After further consideration in the first disciplinary matter of the recommended discipline in light of the applicable attorney discipline standards and case law and after assessing the additional culpability in the subsequently-filed second disciplinary matter, together with the applicable aggravating and mitigating factors, the court concludes that the level of discipline for these consolidated matters should be disbarment.

PERTINENT PROCEDURAL HISTORY

First Disciplinary Matter - Case Nos. 11-O-10454 (11-O-11816); 11-O-13784; 11-O-15875 (11-O-15877)

On March 1, 2012, Respondent and the State Bar signed a Stipulation Re Facts, Conclusions of Law and Disposition. State Bar Court Hearing Judge Richard A. Platel approved the stipulation on March 14, 2012. The Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving was filed on March 14, 2012.

On August 27, 2012, the Supreme Court issued an order returning the stipulation for further consideration of the recommended discipline in light of the applicable attorney discipline standards.

Second Disciplinary Matter - Case No. 12-O-14622

On August 31, 2012, the State Bar filed a Notice of Disciplinary Charges (NDC) in case No. 12-O-14622. Respondent filed a response on October 15, 2012.

On October 5, 2012, the first and second disciplinary matters were consolidated.

On January 4, 2013, the State Bar filed a motion to amend the NDC in the second disciplinary matter.

January 8, 2013 Consolidated Hearing

A hearing was held on January 8, 2013. Deputy Trial Counsel Brandon K. Tady represented the State Bar. Respondent was represented by attorney Timothy G. Richardson II. No additional evidence was offered regarding the first disciplinary matter. The State Bar's

motion to amend the NDC in the second disciplinary matter was granted, as there were no objections by Respondent's counsel.²

Although his attorney was present, Respondent failed to appear at trial, despite a notice to appear by the State Bar, a subsequent order to appear by this court, and communications from his counsel. Respondent was actually aware of the court's order that he appear for trial but he chose to ignore it.

The case was submitted for decision on January 8, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the March 2012 stipulation, Respondent's response to the NDC, and the evidence presented at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on December 11, 1989, and has been a member of the State Bar of California at all times since that date.

First Disciplinary Matter (Stipulation)

Case No. 11-O-11816 (Vasquez Matter)

On June 19, 2009, Gladys Vazquez (Vazquez) hired Respondent to substitute into and represent her in a marital dissolution matter. The scope of Respondent's representation included obtaining final orders for marital dissolution, child custody, and child support in Los Angeles County Superior Court case No. BD471125. Vazquez paid Respondent \$1,500 in advanced fees.

Respondent never substituted into Vazquez's marital dissolution matter and never provided Vazquez with any legal services of value.

Respondent did not earn any of the \$1,500 advanced fees Vazquez paid him.

² Also, since there were no objections to the admissibility of the State Bar's exhibits, the State Bar withdrew as moot its request for judicial notice, filed January 3, 2013.

In November 2010, Vazquez left numerous telephone messages with Respondent's receptionist, asking Respondent to return her file and also constructively terminating him. Respondent received Vazquez's messages. Respondent did not return any of Vazquez's messages or telephone calls.

On March 23, 2011, the State Bar opened an investigation based on Vazquez's complaint.

On May 27, 2011, Respondent told a State Bar investigator that he had Vazquez's file in his possession, that he intended to return her file to her, and that he intended to refund the \$1,500 to Vazquez "promptly." To date, Respondent has not returned Vazquez's file or refunded the \$1,500 to her.

On June 28, 2011, a State Bar investigator sent a letter to Respondent, addressed to Respondent at his State Bar official membership records address (official address), asking Respondent to provide a written response by July 15, 2011, and address specific issues related to Vazquez's State Bar complaint. Respondent received the State Bar investigator's letter but failed to respond to it.

On July 19, 2011, a State Bar investigator sent another letter to Respondent, addressed to Respondent at his official address and now asking that Respondent provide a written response by August 4, 2011. Respondent received the State Bar investigator's letter but again failed to respond to it.

Count One - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. By failing to substitute into and represent Vazquez in her dissolution matter or provide any legal services of value, Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Count Two - (Rule 3-700(D)(1) [Failure to Return Client Papers/Property])

Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes pleadings, correspondence, exhibits, deposition transcripts, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not. By not returning Vazquez's file to her, Respondent failed to release promptly, upon termination of employment, to the client, at the request of the client, all of the client's papers and property, in willful violation of rule 3-700(D)(1).

Count Three - (Rule 3-700(D)(2) [Failure to Return Unearned Fees])

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned. By not returning the \$1,500 in unearned advanced fees to Vazquez, Respondent failed to refund promptly any part of a fee paid in advance that has not been earned, in willful violation of rule 3-700(D)(2).

Count Four - (Section 6068, subd. (i) [Failure to Cooperate])

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. By failing to provide a written response to the two letters sent by the State Bar investigator, Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent, in willful violation of section 6068, subdivision (i).

Case No. 11-O-10454 (Valenzuela Matter)

On January 27, 2011, the State Bar opened an investigation into allegations of misconduct in case number 11-O-10454.

On June 28, 2011, a State Bar investigator sent a letter to Respondent at his official address, asking Respondent to provide a written response by July 15, 2011, to specific issues related to a State Bar complaint filed by Miguel Valenzuela (Valenzuela). Respondent received the State Bar investigator's letter but failed to respond to it.

On July 19, 2011, a State Bar investigator sent another letter to Respondent at his official address, asking that Respondent provide a written response to Valenzuela's State Bar complaint by August 4, 2011. Respondent received the State Bar investigator's letter but again failed to respond to it.

Count Five - (Section 6068, subd. (i) [Failure to Cooperate])

By failing to provide a written response to the two letters sent by the State Bar investigator, Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent, in willful violation of section 6068, subdivision (i).

Case No. 11-O-13784 (Henderson Matter)

On August 14, 2010, Lee A. Henderson (Henderson) was arrested for, inter alia, possession and sale/offer to sell/transportation of marijuana and possession for sale of cocaine base. On July 27, 2010, the Los Angeles County District Attorney's Office filed a felony complaint in the Los Angeles County Superior Court ("Superior Court") against Henderson, titled *The People of the State of California v. Lee Autry Henderson*, case No. BA374023 (*People v. Henderson*).

Henderson was initially represented in *People v. Henderson* by a public defender. However, on August 10, 2010, Henderson hired Respondent to represent him in the matter. Henderson and Respondent entered into a verbal agreement by which Henderson agreed to pay Respondent \$2,500. Henderson also agreed that he would pay Respondent at each court

appearance whatever sums Henderson had available at that time. At the time they entered into the verbal agreement, Henderson paid \$500 to Respondent.

On August 24, 2010, Respondent and Henderson appeared for an arraignment hearing in *People v. Henderson*. At the arraignment hearing, Henderson pled not guilty and the superior court set a pretrial hearing for September 15, 2010. At the arraignment hearing, Henderson paid \$400 to Respondent.

On September 15, 2010, Respondent and Henderson appeared for the pretrial hearing in *People v. Henderson*. At this scheduled pretrial hearing, Henderson paid \$200 to Respondent. At Respondent's request, the superior court then ordered the pretrial hearing trailed to October 8, 2010.

By the close of September 15, 2010, Henderson had paid a total of \$1,100 to Respondent. This was the last date that Henderson saw or spoke with Respondent. Between September 15 and October 8, 2010, Respondent did not contact Henderson or inform Henderson that he was not going to appear for the October 8 pretrial hearing. Respondent also did not contact the superior court and obtain a continuance of the October 8 pretrial hearing or arrange to have another attorney appear for Henderson at that pretrial hearing.

On October 8, 2010, Respondent and Henderson both failed to appear for the trailed pretrial hearing in *People v. Henderson*. The superior court then forfeited Henderson's bail in the amount of \$150,000 and issued a bench warrant for Henderson's arrest because Respondent and Henderson had failed to appear at the pretrial hearing.

On October 8, 2010, pursuant to the bench warrant, Henderson was arrested and taken into custody.

At no time on or after October 8, 2010, did Respondent take any action in *People v. Henderson* or seek to be relieved as the attorney of record for Henderson.

Between October 8, 2010 and March 8, 2011, Henderson and his sister repeatedly called Respondent. Henderson and his sister were unable to speak with Respondent, and they each left numerous messages with Respondent's receptionist. In each of those messages, Henderson and his sister stated their names, provided their contact information for Respondent to call them, stated they were calling about *People v. Henderson*, requested that Respondent contact them, and requested that Respondent refund the \$1,100; that Henderson had previously paid to Respondent. Although Respondent received these messages, he did not communicate with Henderson or his sister; did not refund any portion of the \$1,100; and did not provide any accounting.

By failing to take any action to represent Henderson and also failing to communicate with Henderson after September 15, 2010, Respondent constructively abandoned Henderson and terminated his employment by Henderson.

On July 6, 2011, a State Bar investigator mailed a letter to Respondent at his official address, asking Respondent to respond in writing to Henderson's State Bar complaint concerning Respondent's representation of Henderson. Respondent received the letter.

On or about July 14, 2011, Respondent called the investigator but did not provide any information concerning the case.

Between on or about July 14 and on or about July 29, 2011, the State Bar investigator called Respondent and left a message for Respondent, identifying herself as a State Bar investigator, identifying the case that she was calling about, and stating that Respondent needed to provide a written response to the letter. Respondent received the message.

On or about July 29 and August 16, 2011, the State Bar investigator mailed additional letters to Respondent at his official address, requesting that Respondent respond in writing to Henderson's State Bar complaint concerning Respondent's representation of Henderson.

Respondent received the letters, but never provided a response or communicated with the State Bar investigator.

Count One - (Rule 3-700(A)(2) [Improper Withdrawal from Employment])

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the client's rights, including giving due notice to the client, allowing time for the employment of other counsel, and complying with rule 3-700(D) and other applicable rules and laws. By failing to appear for the trailed pretrial hearing, by failing to contact the superior court to inform the court that he would not appear at the pretrial hearing, by failing to make arrangements for another attorney to be present on Henderson's behalf at the pretrial hearing, and by failing to respond to Henderson's and his sister's telephone messages, Respondent failed, upon termination of employment, to take reasonable steps to avoid reasonably foreseeable prejudice to his client in willful violation of rule 3-700(A)(2).

Count Two - (Rule 4-100(B)(3) [Failure to Render Appropriate Accounts])

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property. Respondent earned some amount of the \$1,100 paid by Henderson. After the termination of his employment by Henderson, Respondent had a duty to account to Henderson for the amount of that advanced fee that he allegedly earned. Despite demands by the client for such an accounting, Respondent failed to provide one. This failure constituted a willful violation by Respondent of rule 4-100(B)(3).

Count Three - (Section 6068, subd. (i) [Failure to Cooperate])

By failing to respond to the State Bar investigator's letters, Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent, in willful violation of section 6068, subdivision (i).

Case No. 11-O-15875 (Hernandez Matter)

In September 2010, Raul Hernandez (Hernandez) and Christine Rico (Rico) hired Respondent to represent them in a claim against David Zepeda (Zepeda). Hernandez and Rico claimed that Zepeda fraudulently obtained the title to Hernandez's and Rico's home. Hernandez and Rico hired Respondent to have the title to their home transferred from Zepeda's name back to their names. Hernandez and Rico agreed to pay Respondent \$3,000, plus a \$400 filing fee, to represent them in their claim against Zepeda.

On September 27, 2010, Hernandez obtained a cashier's check in the amount of \$1,800, payable to "The Law Offices of Michael Berry & Associates." Hernandez gave this cashier's check to Respondent or to someone acting on Respondent's behalf. Respondent received this cashier's check.

On November 2, 2010, Hernandez obtained a second cashier's check in the amount of \$1,200, payable to "The Law Offices of Michael Berry & Associates." Hernandez gave this cashier's check to Respondent or to someone acting on Respondent's behalf. Respondent also received this cashier's check.

Thereafter, Respondent neither provided any legal services of value to Hernandez nor refunded any of the \$3,000 to Hernandez.

Beginning in May and continuing through August 2011, Hernandez and Rico repeatedly called Respondent and left messages for him. In these telephone messages, Hernandez and Rico

asked Respondent to call them about the status of their claim against Zepeda. Respondent received these telephone messages but did not respond to them.

On August 6, 2011, Hernandez and Rico filed a State Bar complaint against Respondent.

On September 6 and again on September 23, 2011, a State Bar investigator mailed letters to Respondent at his official address, asking that Respondent respond in writing to the State Bar complaint filed by Hernandez and Rico. Respondent received the letters but never provided a response them.

Rule 3-110(A) [Failure to Perform Legal Services with Competence]³

By failing to make a claim or file a lawsuit against Zepeda on Hernandez's and Rico's behalf and by failing to provide any legal services of value to Hernandez or Rico, Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Rule 3-700(D)(2) [Failure to Return Unearned Fees]

By not returning the \$3,000 in unearned advanced fees to Hernandez, Respondent failed to refund promptly any part of a fee paid in advance that has not been earned, in willful violation of rule 3-700(D)(2).

Section 6068, subd. (m) [Failure to Communicate]

Section 6068, subdivision (m), provides that an attorney has a duty to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

³ Because the above Henderson matter and Gutierrez matter (discussed below) were resolved by stipulation before any formal charges were filed, the individual violations were never designated as a “count” in a Notice of Disciplinary Charges.

By failing to respond to Hernandez's and Rico's telephone messages, Respondent failed to promptly respond to reasonable status inquiries of a client in a matter with regard to which he had agreed to provide legal services, in willful violation of section 6068, subdivision (m).

Section 6068, subdivision (i) [Failure to Cooperate]

By failing to provide a written response to either of the two letters sent by the State Bar investigator, Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent, in willful violation of section 6068, subdivision (i).

Case No. 11-O-15877 (Gutierrez Matter)

On September 27, 2010, Fernando and Johanna Gutierrez (Gutierrez) also hired Respondent to represent them in a claim against Zepeda. Gutierrez claimed that Zepeda fraudulently obtained the title to Gutierrez's home. Gutierrez hired Respondent to have the title to their home transferred from Zepeda's name back to their name. Gutierrez agreed to pay Respondent \$3,000, plus a \$400 filing fee, to represent them in their claim against Zepeda.

On September 27, 2010, Gutierrez obtained a cashier's check for \$3,000, payable to "The Law Offices of Michael I. Berry." Gutierrez gave this cashier's check to Respondent or to someone acting on Respondent's behalf. Respondent received this cashier's check. Gutierrez also paid \$400 in cash to Respondent or to someone acting on Respondent's behalf.

Thereafter Respondent neither provided any legal services of value to Gutierrez nor ever refunded to Gutierrez any of the \$3,400.

Beginning in June and continuing through July 2011, the Gutierrez made repeated attempts to speak and meet with Respondent. They left numerous telephone messages with Respondent's assistant/receptionist. In these telephone messages, Gutierrez asked Respondent to return their telephone calls regarding the status of their claim against Zepeda. Respondent received these telephone messages but did not respond to them.

On September 6 and again on September 23, 2011, a State Bar investigator mailed letters to Respondent at his official address, asking that Respondent respond in writing to the State Bar complaint filed by Gutierrez concerning Respondent's representation in their claim against Zepeda. Respondent received these letters but never provided a response to them.

Rule 3-110(A) [Failure to Perform Legal Services with Competence]

By failing to make a claim or file a lawsuit against Zepeda on Gutierrez's behalf and by failing to provide any legal services of value to the Gutierrez, Respondent intentionally, recklessly, or repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

Rule 3-700(D)(2) [Failure to Return Unearned Fees]

By not returning the \$3,000 in unearned advanced fees and \$400 in advanced costs to the Gutierrez, Respondent failed to refund promptly any part of a fee paid in advance that has not been earned, in willful violation of rule 3-700(D)(2).

Section 6068, subd. (m) [Failure to Communicate]

By failing to respond to the Gutierrez's telephone messages, Respondent failed to promptly respond to reasonable status inquiries of a client in a matter with regard to which he had agreed to provide legal services, in willful violation of section 6068, subdivision (m).

Section 6068, subdivision (i) [Failure to Cooperate]

By failing to provide a written response to the State Bar investigator's letters, dated September 6, 2011 and September 23, 2011, Respondent failed to cooperate and participate in a disciplinary investigation pending against Respondent, in willful violation of section 6068, subdivision (i).

Second Disciplinary Matter

Case No. 12-O-14622 (Probation Violations)

On or about August 18, 2011, the California Supreme Court filed its order (Disciplinary Order) in case No. S193832 (State Bar Case Nos. 08-O-10896 et al.), ordering that Respondent be suspended from the practice of law for three years, execution of that period to be stayed; that Respondent be actually suspended from the practice of law for the first 90 days of probation; and that Respondent be placed on probation for three years, subject to the conditions of probation recommended by the Hearing Department of the State Bar Court in its February 16, 2011 Order Approving Stipulation.

Pursuant to the Disciplinary Order, Respondent was ordered to comply with the following terms and conditions of probation:

- a. Comply with the State Bar Act and the Rules of Professional Conduct during the period of probation;
- b. Submit to the Office of Probation written quarterly reports each January 10, April 10, July 10, and October 10 of each year or part thereof during which the probation is in effect, certifying under penalty of perjury whether he has complied with all provisions of the State Bar Act and the Rules of Professional Conduct and all terms of probation during the preceding calendar quarter or part thereof covered by the report and to file a final report no earlier than 20 days prior to the expiration of the probation period and no later than the last day of said period;
- c. Contact the Office of Probation within 30 days of the effective date of the Disciplinary Order and schedule a meeting with a probation deputy;
- d. Submit to the Office of Probation within 30 days of the effective date of the Disciplinary Order proof that Respondent returned (1) his file in the Ramirez matter

- to Ana Gonzalez, or her representative; and (2) his file in the Carter annulment matter to Sixx Carter, or her representative; and
- e. Complete State Bar Ethics School by September 17, 2012, and submit proof of completion to the Office of Probation.

On or about August 18, 2011, the Clerk of the California Supreme Court properly served Respondent with a copy of the Disciplinary Order, which Respondent subsequently received.

The Disciplinary Order became effective on September 17, 2011.

On or about August 30, 2011, a probation deputy of the Office of Probation of the State Bar of California sent a letter to Respondent at his official address, to assist Respondent in complying with the obligations created by the Disciplinary Order. Respondent received this letter. The letter reminded Respondent of the terms and conditions of his probation, including his obligations: (1) to submit proof to the Office of Probation on or before October 17, 2011 of Respondent's return of his files in the Ramirez and Carter matters; (2) to contact and schedule a meeting with a probation deputy on or before October 17, 2011; (3) to file quarterly probation reports during the period of his probation, including a first quarterly report due on or before January 10, 2012; (4) to file a final quarterly report, due September 17, 2014; and (5) submit proof of completion to the Office of Probation by September 17, 2012, of Respondent's completion of the State Bar's Ethics School.

Despite the Disciplinary Order and the Office of Probation's reminder letter, Respondent has effectively ignored his duty to comply with the obligations imposed as conditions of his probation. He did not contact and schedule a meeting with a probation deputy on or before October 17, 2011, or at any time; he did not submit proof to the Office of Probation, on or before October 17, 2011 or at any time, of any return by him of his files in the Ramirez and Carter matters; he failed completely to submit any of the first four required quarterly reports, which

were due January 10, April 10, July 10, and October 10, 2012; and he did not complete the Ethics School by September 17, 2012.

Section 6068, subdivision (k) [Failure to Comply With Probation Conditions]

Section 6068, subdivision (k), provides that it is the duty of an attorney to comply with all conditions attached to a disciplinary probation. Respondent's failures to comply with the above conditions of his probation constituted a willful violation by him of his duties under section 6068, subdivision (k).

Aggravation⁴

Prior Record of Discipline [Std. 1.2(b)(i)]

Respondent has two prior records of discipline. This is a serious aggravating factor.

In his first prior record of discipline, Respondent stipulated to a private reproof for failing to perform services and failing to promptly return client files in one client matter. (State Bar Court case No. 02-O-11413, effective June 18, 2003.)

In his second prior record of discipline, Respondent stipulated to three years' stayed suspension, three years' probation, and 90 days' actual suspension for professional misconduct in four client matters, including failing to obey court orders, failing to perform services, failing to communicate, failing to refund unearned fees, failing to report court sanctions, and failing to promptly return client files. (Supreme Court order No. S193832; State Bar Court case Nos. 08-O-10896; 08-O-14024; 09-O-10811; 09-O-15003, effective September 17, 2011.)

Multiple Acts/Pattern of Misconduct [Std. 1.2(b)(ii)]

Respondent has committed multiple acts of wrongdoing in these matters.

⁴ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Harm to Client/Public/Administration of Justice [Std. 1.2(b)(iv)]

Respondent stipulated that his misconduct caused harm to Vazquez, Henderson, Hernandez and Rico, and the Gutierrez because Respondent accepted advanced fees from each of these clients and did not provide any legal services of value for them. Respondent's failures to provide any legal services of value to these clients delayed the resolution of, and the relief sought in, their matters.

Indifference Toward Rectification/Atonement [Std. 1.2(b)(v)]

An attorney's continued failure to comply with his probation conditions after being notified of that noncompliance is an aggravating circumstance. It demonstrates indifference toward rectification of or atonement for the consequences of the previously disciplined attorney's prior misconduct. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.) Although the NDC regarding Respondent's probation violations was filed in August 2012 and Respondent admitted in his October 2012 response that he violated those conditions, he thereafter failed to continue to comply with his probation conditions.

In addition, Respondent's failure to participate in the trial of this matter, despite this court's order that he do so, further demonstrates his indifference to rectification and atonement.

Mitigation

Extreme Emotional/Physical Difficulties [Std. 1.2(e)(iv)]

The State Bar and Respondent stipulated that, commencing around the latter half of 2009, a member of Respondent's family became seriously ill. Respondent did not have medical insurance that covered the treatment for the family member's illness. Also, Respondent was not able to pay for the required treatment. Respondent's family member's illness and Respondent's difficult financial situation related to that illness caused Respondent to suffer extreme emotional distress.

In this proceeding, Respondent's counsel noted that Respondent is struggling with chronic depression in the last two years of his practice and the inability to afford proper expert medical attention. However, no causal nexus was established between his emotional difficulties and his misconduct, and no expert or other persuasive evidence was admitted showing that he no longer suffers from such difficulties. Thus, such emotional difficulties do not constitute a substantial mitigating factor. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416.)

Cooperation With State Bar [Std. 1.2(e)(v)]

Respondent's candor and cooperation with the State Bar, by entering into a stipulation as to facts, conclusions of law and disposition in the first disciplinary matter, is given some weight in mitigation. However, that weight is reduced by Respondent's failure to appear at the hearing of this matter.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than 20 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed

unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 1.7(b), which provides that when an attorney has two prior records of discipline, the degree of discipline in the current proceeding is to be disbarment unless the most compelling mitigating circumstances clearly predominate.

There are no compelling mitigating circumstances in this matter. Instead, there is a track record of repeated violations by Respondent of his professional obligations, to the detriment of the public. Worse, Respondent has now demonstrated a overwhelming and ongoing indifference to the disciplinary process. In sum, it is clear that strong steps must be taken to protect the public from future professional misconduct on his part. For all of the above reasons, this court concludes that it is both appropriate and necessary that Respondent be disbarred. In addition, he must be required to make restitution to those clients whom he harmed.

RECOMMENDATIONS

It is recommended that respondent **Michael Ian Berry**, State Bar Number 141993, be disbarred from the practice of law in California and Respondent's name be stricken from the roll of attorneys.

Restitution

It is also recommended that Respondent make restitution to the following persons:

- (1) Gladys Vasquez in the amount of \$1,500 plus 10 percent interest per year from May 27, 2011;
- (2) Lee Autry Henderson in the amount of \$1,100 plus 10 percent interest per year from March 8, 2011;
- (3) Raul Hernandez in the amount of \$3,000 plus 10 percent interest per year from August 31, 2011; and
- (4) Fernando and Johanna Gutierrez in the amount of \$3,400 plus 10 percent interest per year from July 31, 2011.

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

It is further recommended that Respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Respondent **Michael Jan Berry**, State Bar number 141993, is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail.

ORDER VACATING STIPULATION

The order filed March 14, 2012, approving the parties' Stipulation Re Facts, Conclusions of Law and Disposition in the above-entitled matter, is hereby vacated.

Dated: April _____, 2013

DONALD F. MILES
Judge of the State Bar Court